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NO._____

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MATTHEW MARION FONDEL,

Petitioner,

V.

FORD MOTOR COMPANY;D.C. LONG; M. J. GAYNIER; WM. BAILEY; JOSEPH GORMLEY; EARL SCHLABACH; B.D. PICKEL; WILLIAM BOHL;JAMES ZEHNAL; WALTER FITZGERALD; JOHN PIERCE; T. J. MIREE; ARNOLD G. SHULMAN; STEPHEN D. BOLERJACK; D. P. FORBERGER; WM. TARNACHE; J. G. RIVARD; P. E. MENDOLA; WM. PICKEL,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

T O THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (C.A. NO. 85-1759)

MATTHEW MARION FONDEL

PRO SE

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I. QUESTIONS PRESENTED FOR REVIEW

A. Did the application of res judicata in this particular case contravene an overriding public policy and result in manifest injustice given that (1) no issues were dicided in the prior cause, which ended in a penalty dismissal, and; (2) a latter judgment of an administrative agency decided the issues in favor of petitioner.

B. Does the fraud-on-the-court performed by the respondents require that they be denied all relief and that judgment be entered for petitioner.

EDITOR'S NOTE:

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B. Did the "fraud-on-The-Court" performed on the court by the respondents require that they be denied all relief and the judgment be entered for the petitioner.

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Opinion of the United States Court of Appeals for the Sixth Court denying petition for rehearing en banc Page A8

III. PETITION FOR WRIT OF CERTIORARI

Petitioner, Matthew Marion Fondel, prays that a writ of certiorari issue to review the judgemnt of the sixth circuit (C.A. No. 85-1759) which affirmed the judgment of the United States District Court for the Eastern District of Michigan dismissing petitioner's claim on respondent's invocation of res judicata.

IV. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit concerning which the Court's review is sought is reproduced in the appendix hereto at pp. A1-A3

The opinion of the United States Court of Appeals denying petitioner's timely filed motion for re-hearing en banc is reproduced in the appendix hereto at pp. A4.

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VI. JURISDICTIONAL STATEMENT

Petitioner request this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit of 2 September 1986 affirming the dismissal of petitioner's claim on res judicata. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1)

VII. CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution, 13th and 14th amendment, i.e., the right to be free from racial discrimination

Title 42 United States Code, Section 1981, 1985(3), 1986.

SECTION 1981. All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the secruity of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SECTION 1985(3). If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly any person or class of persons of the equal protection of the laws or of equal

privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for president or vice president, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case or conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any

act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or priviledge of a citizen or the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

SECTION 1986. Every person who having a knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having the power to prevent or aid in preventing the commission of the same, neglects or refused to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such

wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action.

ELIOTT-LARSEN (ACT 453,1976,P1701;EFF MARCH 31, 1977), Anti Discrimination Law of the State of Michigan, Also state Law prohibiting libel, slander, and defamation of character.

VII. STATEMENT OF THE CASE

On or about 2 June 1981, petitioner (FONDEL) brought suit in United States District Court For the Eastern District of Michigan, Civil Action No. 81-71757 (FONDEL I), for racial discrimination in employment against respondents pursuant to Title 42 Section 2000e and Title 42 Section 1985.

The district court in Fondel I issused an order on 20 September 1982 dismissing the individual defendants from the suit for failure of Fondel to specifically name the individual defendants in the complaints filed with the EEOC. Subsequently the district court issued a penalty dismissal against Fondel in favor of Ford dismissing the remaing claim for failure of Fondel to prosecute. The U.S. Court of Appeals' affirmation of the penalty dismissal

was appealed to this Court (Case No. 85-5563), however, Fondel was financially unable at that time to pursue the appeal.

Following the penalty dismissal, an administrative agency, The Michigan Employment Security Commission (MESC), decided the issues presented in Fondel I in favor of Fondel by adopting the order of the Circuit Court for the Third Judicial Circuit of Michigan (Fondel v MESC, Civil Action No. 82-210-289AE). The MESC and the court held that Fondel was dismissed from employment because of his race and the desire of Ford to reduce the work force due to the adverse impact of foreign trade.

On the basis of the ruliing of the MESC, Fondel demanded of Ford re-instatement with back pay and promotion. Ford refused and Fondel filed informal EEO Complaints against

Ford and the individual defendants and subsequently formal complaints with the district court. The Complaints in the district court (FONDEL II) were pursuant to Title 42 Section 1981, 1985, and 1986 and charged Ford and the individal defendants with CONTINUING VIOLATIONS of Mr.Fondel's right to be free from racial discrimination.

The district court dismissed the complaints of FONDEL II on the defendants' invocation of res judicata and refused to consider Fondel's attempt to invoke the doctrines of collateral estoppel and stare decisis against Ford via the ruling of the MESC and a judgment in the U. S. District Court for the Eastern District of Michigan against Ford , Hatton v Ford, 508 F.Supp. 624, which was analogous to Fondel's charges.

IX. REASONS FOR GRANTING WRIT

A. CERTIORARI SHOULD BE GRANTED AS THE APPLICATION OF RES JUDICATA IN THIS CASE WAS INAPPROPRIATE AND CONTRAVENED AND OVERRIDING PUBLIC POLICY

The events against which Fondel sought relief in Fondel II occurred AFTER Fondel I and arose out of separate and different EEO complaints. Fondel II was advanced pursuant to Title 42 Section 1981, 1985, and 1986 against defendants who were dismissed without prejudice from Fondel I prior to a final decision in Fondel I. Therefore it is the law of this case that the claims against the individual defendants in Fondel II could not have been advanced against the individual defendants in

Fondel I as the district court in Fondel I rule that Fondel could not maintain an action against the individual defendants as a result of the failure to name the in the EEO complaints.

The Sixth Circuit, the circuit in which Ford Motor Company is headquartered and is a major business entity, has prevented all claims against Ford by Fondel and has in effect, given FORD card blanche to continue to discriminate against Fondel without Fondel being able to seek relief in the courts, all on the basis of a penalty dismissal which decided no issues.

Ford continues to claim that Fondel was discharged for poor performance and continues to provide adverse employment references to employers of Fondel despite the decision of a

court and administrative agency that Fondel was discharged because of his race. Adverse employment references were provided by Ford to the Defense Investigative Agency,an agency doing a background investigation on Fondel for purposes of securing for Fondel a security clearance, on 6 March 1984. Fondel is prevented by the Sixth Circuit Court of Appeals from filing suit for damages for this adverse reference and from filing suit for damages for any future damages resulting from actions of Ford. This situation is in direct conflict with ths Court's findings in FORD MOTOR COMPANY V EEOC, 29 FEP CASES 121. Ford further has no legitimate defense to the charges that Fondel was discharged due to racial discrimination as the emplolyment practices of Ford which resulted in Fondel's discharge were declared

illegal in HATTON V FORD, 508 F.SUPP. 624 (MICHIGAN 1981).

The legal authorities supporting Fondel's argument that the Sixth Circuit should have awarded him judgment under the doctrine of collateral estoppel and stare decisis are this Court's decision in PARKLANE HOSIERY CO.,INC., ET.AL. V SHORE, CASE NO 77-1305,439 U.S. 322; and the Sixth Court's decision in TIPLER V E.I. DUPONT DE NEMOURS AND CO., 443 F.2D. (1971) and SIMMONS V UNION NEWS CO., 341 F.2D. 531 (1965).

The penalty dismissal which Ford obtained was improper and contrary to the law of the Sixth Circuit in that, (1) the Sixth Circuit acted contrary to its case law of TEFFT V SEWARD, 689 F.2D. 637 in affirming the decision of the district court in Fondel I to not grant Fondel a continuance to ammend his form

complaint, which was provided by the court to Fondel;and (2) the judgment of default in Fondel I was entered by a judge, The Honorable Robert DeMascio , with a well documented intolerance for civil rights litigants.

The Honorable Robert DeMascio has been repeatedly reversed by the U. S. Court of Appeals for the Sixth Circuit for improper actons in relation to civil rights litigants. In Martin v Johnson , 471 F.2d. 705, the Sixth Circuit reversed the Hon. Robert DeMascio for gathering information on a civil rights litigant outside of the judicial process, and basing his decision on that information.

Again in 1980 in BRADLEY V MILLIKEN 620 F.2D. 1143, The Sixth Circuit stated its concern that the plaintiffs charged that the Hon. Robert DeMascio had obtained reports from

experts that were not placed in the record nor made available to the parties, BRADLEY @ 1158. Appellant, Fondel, similary charged in an affidavit of prejudice filed against Hon. Robert DeMascio that the judge was basing his decision on information not in the record. The Hon.Robert DeMascio ignored the affidavit of prejudice (i.e. he did not rule on its legal sufficiency) and proceeded to issue a penalty dismissal against Fondel when he was , as a result of the fiing of a sufficient affidavit of prejudice against him, without jurisdiction to proceed in the case.

Finally, the Honorable Robert DeMascio, the judge in Fondel I, was the district judge on Appeal in Sixth Circuit Case TEFFT V SEWARD, 689 F.2D. 637 in which the Sixth Circuit reversed the Hon. Robert DeMascio for his

failure/refusal to grant a continuance to ammend a complaint. The Hon. Robert DeMascio ignored this direction and proceeded to deny Fondel a continuance to ammend his form complaint.

B. CERTIORARI SHOULD BE GRANTED AS THE APPELLEES PERFORMED A FAUD-ON-THE-COURTS WHICH BY LAW SHOULD DENY THEM ALL RELIEF.

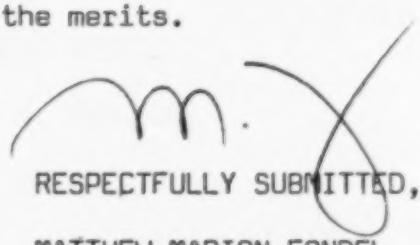
The attorney representing Ford in Fondel I, Arnold Shulman, was the losing attorney in Hatton V Ford and thus knew or should have known that the employment practices protested by Fondel in Fondel I were already illegal via Hatton.

Attorney Stephen Bolerjack represented Ford before this Court in FORD V EEOC, 29 FEP CASES 121 and was therefore aware of this Court's postion that civil rights issues should be settled in the shortest possible time. It appears that Ford's position in FORD V EEOC was not in good faith and was not initiated to mitigate damages in civil rights suits, but was part of Ford's strategy of forcing civil rights

litigants into never ending unnecessary litigation.

X. CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant a Writ of Certiorari and accept plenary review of this case on the merits.



RESPECTFULLY SUBMITTED,

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no. 85-1759

MATTHEW MARION FONDEL

Plaintiff-Appellant,

v. O R D E R

FORD MOTOR CO.; D.C. LONG;M. J. GAYNIER; WM. BAILEY;JOSEPH GORMLEY;EARL SCHLABACH; B.D.PICKEL; WILLIAM BOHL; JAMES ZEHNAL; WALTER FITZGERALD; JOHN PIERCE; T.J. MIREE; ARNOLD G. SHULMAN; STEPHEN D. BOLERJACK; D. P. FORBERGER; WM. TARNACHE; J.G. RIVARD; P.E. MENDOLA; WM. PICKEL,

Defendants-Appellees.

BEFORE: LIVELY and MERRITT, Circuit Judges;

CONTIE, Senior Circuit Judge

This pro se plaintiff appeals from a district court judgment dismissing his six civil rights complaints for being barred under the doctrine of res judicata.

In the six suits, the plaintiff sued his former employer and many of its employees claiming that they subjected him to racial and sexual discrimination and that they terminated his employment in retaliation for his having filed a charge of discrimination with the EEOC. Upon review of the cause, the district court concluded that the issues presented in the suits were or should have been presented in plaintiff's prior suit which concerned the same subject matter. The prior suit was dismissed with prejudice for failure to prosecute pursuant to Rule 41(b), Federal Rules of Civil

Procedure. That dismissal was affirmed by the Sixth Circuit.

Upon review of the cause in light of the arguments raised by the parties in their respective appellate briefs, this Court concludes that the plaintiff's suits were,indeed, barred under the doctrine of res judicata. Although the district court used imprecise language to explain its dismissal under res judicata, it did, nonetheless, reach the correct conclusion.

The plaintiff is correct to argue that issue preclusion or collateral estoppel, does not attach to a judgment dismissing a suit for lack of prosecution. An issue must be actually and necessarily determined by a judgment in order for the parties to be barred from further litigating that issue under the doctrine of

collateral estoppel. See MONTANA V UNITED STATES, 440 U.S. 147, 153-154 (1979); DODRILL V LUDT, 764 F.2D 442 (6TH CIR. 1985).

The plaintiff is, however, barred under the doctrine of res judicata, or claim preclusion, from litigating between these parties all claims which were or could have been litigated in his prior suit. See ANCHOR MOTOR FREIGHT V INTERNATIONAL BROTHERHOOD OF TEAMSTERS, 700 F.2D 1067(6TH CIR.),CERT.DENIED, 464 U.S. 819 (1983);NATHAN V ROWAN,651 F.2D 1223 (6TH CIR.1981). Plaintiff's prior suit alleged claims of discrimination against his former employer and fellow employees. Since it was dismissed for failure to prosecute pursuant to Rule 41(b), Federal Rules of Civil Procedure, it was dismissed on the merits. SEE HART V YAMAHA-PARTS DISTRIBUTORS, INC., 787

F.2d 1468 (11th Cir. 1986); Cemer v. MARATHON OIL COMPANY, 583 F.2D 830 (6TH CIR. 1978). As a judgment was entered on the merits of plaintiff's claims, plaintiff was, therefore, barred by claim preclusion from presenting any future claims, even if under different legal theory of liability, that arise out of the same subject matter of his prior suit. SEE HART V. HAMAHA-PARTS DISTRIBUTORS INC., SUPRA; CANNON V LOYLA UNIVERSITY OF CHICAGO,784 F.2D 777(7TH CIR. 1986); CEMER V MARATHON OIL COMPANY, SUPRA. Since the plaintiff sought to again assert claims of discrimination regarding his prior working conditions and termination of employment, which were or could have been presented in his prior suit, the plaintiff's suits were properly dismissed for being barred under the doctrine of res judicata.

Furthermore, no extraordinary circumstances are present to warrant an exception to this bar on public policy considerations. Plaintiff also cannot persuasively argue that the defendants are themselves barred under the doctrine of collateral estoppel. This argument was of no avail in plaintiff's prior suit; and it is plainly frivolous. Res judicata does not even apply to these cases. They arose from a different subject matter, and they lack identity of parties. SEE CITY OF DETROIT V NORTOWN THEATRE, INC., 116 MICH. APP. 386, 323 N.W. 2D 411 (1982), and cases cited therein. Plaintiff's claim of judicial bias is likewise spurious.

For these reasons, this panel unanimously agrees that oral argument is not necessary in

this appeal. Fule 34(a), Federal Rules of Appellate Procedure. The district court's judgment is, accordingly,affirmed for the foregoing reasoins pursuant to Rule 9(d)(3), Rules of the Sixth Circuit. the appellee's request for an award of costs and fees is hereby denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK

NO. 85-1759

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MATTHEW MARION FONDEL

Plaintiff-Appellant,

V. O R D E R

FORD MOTOR CO., ET. AL.,

Defendants-Appellees

BEFORE: LIVELY,CHIEF JUDGE, MERRITT, CIRCUIT JUDGE, AND CONTIE, SENIOR CIRCUIT JUDGE

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the originalpanel members but also to all other active judges of

this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition wre fully considered upon the original submission and decision of the case. accordingly, the petiton is denied.

ENTERED BY ORDER OF THE

COURT

JOHN P. HEHMAN, CLERK